

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40227
Docket No. MW-39603
09-3-NRAB-00003-060160
(06-3-160)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned junior employe K. Bremer to a special machine operator position of operating the track stabilizer on the Surfacing Crew on August 23, 24, 25 and 26, 2004, instead of Special Machine Operator J. Delap (System File C-38-04-C060-15/8-00219-125 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Delap shall now be compensated for forty (40) hours at the applicable straight time rate of pay and twelve (12) hours at the applicable time and one-half rate of pay.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant claim alleges that the Carrier violated the provisions of the Agreement by utilizing junior employee K. Bremer to work as a Special Machine Operator from August 23 through August 26, 2004, while the regularly assigned Special Machine Operator operating the track stabilizer on Production Crew No. 2 in the Winona area took a regularly scheduled vacation. The Organization alleges that because the Claimant maintains Group 1, Rank (a) Special Machine Operator seniority and Bremer holds no seniority on that roster, the Claimant should have been utilized to fill the vacation absence.

The Carrier contends that the absence was less than 30 days and, therefore, it was properly filled in accordance with Rule 8(c) which states:

“(c) New positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, except that senior available, qualified employees, on proper request to the Division Engineer, will be given preference, with the understanding they will not be paid for time lost nor for time consumed traveling to and from such position. . . .”

The Carrier argues that the foregoing Rule specifies that the senior employee must be available and qualified, with a proper request submitted to supervision, in order to be given preference to fill the vacation absence and, in this case, the Claimant satisfied none of these prerequisites. The Carrier asserts that the Claimant (1) was not qualified to operate the track stabilizer (2) he was unavailable because he was fully assigned on Production Crew No. 6 and (3) he had not properly submitted a request to fill the position. The Carrier submits that Bremer was assigned to Production Crew No. 2 and because he expressed an interest to operate the track stabilizer, the Carrier properly determined that he should be assigned to fill the position.

The Organization contends that because neither Bremer nor the Claimant had been trained to operate the track stabilizer, preference should have been given to the Claimant, who holds Special Machine Operator seniority. We agree. The Organization argues that Appendix B, Section 12(B) supports its position and provides as follows:

“B. As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute ‘vacancies’ in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority.”

The Board finds that Section 12(B) and not Rule 8(c) controls the outcome in the instant case. Under Section 12(B) absences from duty due to vacation are not “vacancies” and, therefore, Rule 8(c) does not apply. Once the Carrier determined to assign the position of the vacationing employee, and a regular relief employee was not utilized, the Carrier was required to comply with the specific vacation language of Section 12(B) by making efforts to observe seniority. There is no record evidence to show that those efforts were made. Consistent with prior Awards on this same subject, the Board finds that the Agreement was violated. See Third Division Awards 5917, 14510, 14621 and 15637.

Late in the handling of this claim, the Carrier cited Rule 33 – Composite Service Rule, which specifies that the Carrier “can use any employee to fill the position of another employee and pay them the appropriate rate without consideration of seniority. . . .” Rule 33 does not change the result in this case. It is well-established that the Composite Service Rule is concerned primarily with the pay for work performed. It does not govern seniority or the right to work and, therefore, it does not control nor does it supersede the specific provisions regarding seniority for vacation positions. Third Division Awards 19816 and 37472.

Based on a thorough review of the record, the Board finds that the Claimant had established seniority as a Special Machine Operator. The Carrier failed to comply with Section 12(B) when it assigned an employee with no Special Machine Operator seniority to fill in for the vacationing employee, thereby disregarding the Claimant’s contractual seniority rights. Consistent with prior Awards on this same subject, the Board finds that the Agreement was violated. See Third Division Awards 5917, 14510, 14621 and 15637.

The Carrier objected to the remedy sought by the Organization and argued that the Claimant was employed on the dates in question. The Board finds merit to that argument. The purpose of a monetary remedy is to make the aggrieved employee whole. The Claimant will be allowed the difference between what he should have received had he been assigned to fill in for the vacationing employee and what he actually received on his assigned position for the period of August 23 through August 26, 2004.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of December 2009.